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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1363

WILLIAM DAVIS MARTIN,

Petitioner,

v.

W. GRAHAM CLAYTOR, JR.,
SECRETARY OF THE NAVY, ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF PETITIONER

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POINT I

THE PRESIDENT MANIFESTED
NO INTENTION NOT TO
PROMOTE PETITIONER

The sections of law and constitutional
provisions cited in the Petition indicate beyond

argument that Congress intended that a decision of Presidential calibre be made by the President specifically to the exclusion of the head of a department, particularly as relates to the appointment power. It was also pointed out that the Secretary prepares and signs commissions for the President, and gave as his reason for not promoting Petitioner the alleged removal from the promotion list. Moreover, in the brief of the government in the Court of Appeals, there is the following confirmation that the President does not sign and prepare commissions:

The fact that the Senate had already confirmed appellant's temporary appointment and that the Secretary, acting for the President, customarily prepares and signs commissions, is irrelevant. The determinative facts are that the President, either acting alone or through the Secretary, did not prepare and issue a commission to appellant and that appellant retired at the rank of commander, having never assumed the rank of captain.

See also the Affidavit of Col. Smith, record on appeal, in opposition to the motion for

summary judgment.

Although the President does not have any obligation to appoint the petitioner, he does by constitutional and statutory provisions alluded to in the Petition have the duty to make a Presidential decision which was not done in this case. As cited in the Petition, the President was never informed of the incident. Respondents should be directed to lay before the President for Presidential decision whether or not the petitioner should be promoted.

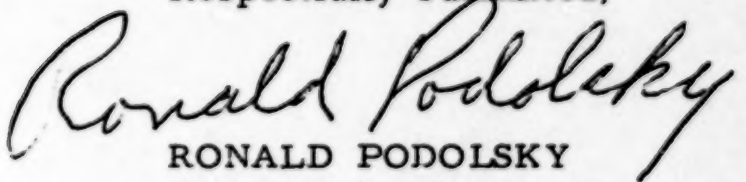
In response to any argument that the President is too busy or should not be bothered with such a decision, it is observed that the statutes and constitutional provisions specifically vest that decision in the President and not in the head of the department. If the President was unwilling to retain such Presidential power, he could well have vetoed the

legislation making the decision a Presidential one. His signing of the legislation indicated that such decision was not too burdensome for the President to make, and indicated his endorsement of the legislative will expressed in the statutes.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Ronald Podolsky". The signature is written in dark ink and is positioned above the printed name and title.

RONALD PODOLSKY
Attorney for Petitioner